LIEW CHOY HUNG

v.

SHAH ALAM PROPERTIES SDN. BHD.

SUPREME COURT, KUALA LUMPUR
ANUAR ZAINAL ABIDIN CJ (MALAYA)
MOHD AZMI FCJ
EDGAR JOSEPH JR. FCJ
[CIVIL APPEAL NO: 02-90-94]
28 APRIL 1997

TORT: *Damages - Assessment - Dwelling house damaged by flooding and water-logging - Claim for diminution in capital value of house - Whether allowable*

TORT: *Damages - Assessment - Damage to real property - Measure of damage - Test to be applied - Diminution in capital value of property - Considerations - Whether owner reasonably intends to sell property - Whether consequential if owner not in occupation*

The appellant's luxury house ('the house') situate in Ukay Heights, Kuala Lumpur was extensively damaged by severe flooding and water-logging attributable to acts of nuisance and negligence on the part of the respondent. Thereafter, the appellant commenced proceedings against the respondent whereupon the latter admitted liability, and special damages were agreed at RM42,000 to cover the cost of repairs or re-instatement. The trial Judge, however, rejected the appellant's claim of RM90,000 for general damages in respect of the alleged diminution in the capital value of the house. The trial Judge held that, in assessing damages in the case of a tort causing damage to real property, the diminution in the capital value of the property is the true measure of damage if, and only if, the plaintiff concerned is selling or reasonably intends to sell the property in its damaged state, or if it can be established that the plaintiff is holding on to the property merely for investment. Where the plaintiff reasonably intends to continue to occupy the property and to repair the damage, as was in the instant case, the trial Judge held that the cost of repairs or re-instatement is clearly the proper measure of damage. Dissatisfied, the appellant appealed to the instant Court.

Held:
Per Edgar Joseph Jr. FCJ

[1] The trial Judge's approach to the assessment of damages in regard to the appellant claim's in respect of the diminution in the capital value of the house was unduly rigid. His Lordship had failed to consider the fact

that land has a reputation and, when a stigma attaches to a dwelling house, because it is prone to flooding, it does not matter whether the owner is in occupation of it because he will eventually sell it.

[2] In the result, the appellant's claim of RM90,000 for general damages in respect of the diminution in the capital value of the house was neither excessive nor wrong in principle.

[Appeal for general damages allowed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

***TORT:** Gantirugi - Taksiran - Rumah kediaman rosak oleh banjir dan air bertakong - Tuntutan bagi pengurangan dalam nilai modal rumah - Samada boleh dibenarkan*

***TORT:** Gantirugi - Taksiran - Kerosakan kepada hartanah - Tahap kerosakan - Ujian yang harus dipakai - Pengurangan dalam nilai modal hartanah - Balasan - Samada tuanpunya secara wajarnya berniat untuk menjual hartanah - Samada penting jika tuanpunya tidak menghuni*

Rumah mewah perayu ('rumah tersebut') yang terletak di Ukay Heights, Kuala Lumpur telah menjadi musnah dengan teruknya oleh pembanjiran dan takungan air yang serius yang disebabkan oleh perbuatan kacau-ganggu dan kecuaian oleh pihak responden. Selepas itu, perayu telah memulakan tindakan undang-undang terhadap responden lalu pihak yang terkemudian itu telah mengakui tanggungan; dan gantirugi khas telah dipersetujui sebanyak RM42,000 bagi meliputi kos pembaikan atau pemulihan-semula. Hakim perbicaraan, walaubagaimanapun, telah menolak tuntutan perayu sebanyak RM90,000 untuk gantirugi am berhubung dengan pengurangan yang dikatakan dalam nilai modal rumah itu. Hakim perbicaraan memutuskan bahawa, dalam menaksirkan gantirugi dalam kes tort menyebabkan kerosakan kepada harta tanah, pengurangan dalam nilai modal hartanah tersebut adalah pengiraan sebenar kerosakan jika, dan hanya jika, plaintif yang berkaitan hendak menjual atau secara munasabahnya berniat untuk menjual hartanah dalam keadaannya yang rosak itu, atau jika ianya boleh ditentukan bahawa plaintif hanya menyimpan hartanah itu bagi tujuan pelaburan. Di mana plaintif secara wajarnya berniat untuk terus menghuni hartanah itu dan untuk membaik-pulih kerosakan tersebut, sepertimana keadaan dalam kes semasa ini, Hakim perbicaraan memutuskan bahawa kos pembaikan atau pemulihan-semula adalah jelasnya pengiraan gantirugi yang wajar. Berasa tidak puashati, perayu telah merayu kepada Mahkamah ini.

Diputuskan:
Oleh Edgar Joseph Jr. HMP

[1] Pendekatan Hakim perbicaraan berhubung dengan taksiran gantirugi mengenai tuntutan perayu berhubung dengan pengurangan dalam nilai modal rumah tersebut adalah terlalu tegar. Yang Arif telah gagal untuk menimbangkan hakikat bahawa tanah mempunyai reputasi dan apabila suatu stigma terdapat pada sebuah rumah kediaman, kerana ianya sering dilanda banjir, hal samada tuanpunya rumah itu menghuninya tidak menjadi persoalan kerana lambat laun beliau akan menjualnya juga.

[2] Akibatnya, tuntutan perayu sebanyak RM90,000 bagi gantirugi am berhubung dengan pengurangan dalam nilai modal rumah tersebut adalah tidak keterlaluan ataupun salah di sisi prinsip.

[Rayuan untuk gantirugi khas dibenarkan.]

Cases referred to:
Dodd Properties (Kent) Ltd. v. Canterbury City Council [1980] 1 All ER 928 ***(refd)***
Bunclark & Others v. Hertfordshire County Council & Anor. [1977] CLY 2148 ***(foll)***

[Appeal from High Court Malaya, Kuala Lumpur; Civil Suit No: P- 55-82]

For the appellant - C.V. Das; M/s. R.K. Nathan & Co.
For the respondent - Prasad Abraham; M/s. Prasad Abrahim & Assoc.

JUDGMENT

Edgar Joseph Jr. FCJ:

The appellant's luxury home known as No. 16, Jalan Beverley, Ukay Heights, Kuala Lumpur – an exclusive residential area – was extensively damaged by severe flooding and water-logging which occurred between the months of August to November 1981, and again between February and March 1982, the damage having been caused by acts of nuisance and negligence on the part of the respondent, their servants or agents. These events led to the appellant commencing proceedings against the respondent in the High Court, Kuala Lumpur, and at the hearing, liability was admitted. As for the quantum of damages, special damages had been agreed at "RM42,000" to cover cost of repairs or reinstatement and had indeed been paid pursuant to a consent order entered prior to the date of hearing.

One aspect of the claim for general damages which was hotly disputed related to the alleged diminution in value of the appellant's home, for which she prayed for RM90,000. In support of this part of her claim, the appellant had relied upon the opinion of a chartered valuation surveyor and registered valuer Th'ng Kim Kok, according to which "the depreciation in value due to the nuisance

and constant threat of continuing flooding, is in the region of RM90,000." The learned trial Judge had, however, rejected this branch of the appellant's claim for reasons which appear sufficiently from a certain passage in his judgment to which we shall now refer.

Having referred to the following passage in the judgment of Donaldson LJ in *Dodd Properties (Kent)) Ltd. v. Canterbury City Council* [1980] 1 All ER 928 at p. 938:

> The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or the other of two quite different measures of damage, or occasionally, a combination of the two. The first is to take the capital value of the property in the undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations.

the learned trial Judge continued:

> ..., it is clear to me that in order to achieve the general object underlying the rules for the assessment of damages in the case of tort causing damage to real property, the Court is required to apply one or other of two quite different measures of damage. The first is to adopt the diminution in value to the plaintiff and the second is to adopt the actual cost of repair or reinstatement. Which measure is appropriate will depend on a number of factors. Be that as it may the diminution in value is the true measure of damage if and only if the plaintiff is selling or reasonably intending to sell the property in its damaged state or where it can be established that the plaintiff is holding on the property merely for investment purpose. On the other hand if the plaintiff intends to continue to occupy it and to repair the damage the proper measure is clearly the cost of all such repairs.
>
> Now in the present case the plaintiff had elected to occupy and to carry out all necessary repairs. She moved out of the property only one year ago not because of floods but for "personal reason" of which this Court has no knowledge. It is also relevant to note that upon her shifting out of the premises, she let it out to a third party. The ownership and possessory rights attached to such ownership still remain with her. Indeed the evidence adduced in the present case dehors (?) any suggestion that the plaintiff is merely holding on to the premises as an

> investment. In this connection it is to be noted that the Chester Ho's report was obtained for purpose of establishing the repair costs while the Th'ng's report was compiled solely to support the plaintiffs claim in this action. Under the circumstances I am not satisfied that the plaintiff can claim for damages arising from diminution in the value of her property. The proper measure of damage to apply in the present case is to take the costs of all repairs or reinstatements.

The appellant being dissatisfied with the learned trial Judge's decision had appealed to this Court.

Before us, the whole of the material evidence as regards the claim for diminution in value was examined by Counsel on both sides with great care and it is unnecessary to discuss it again. Suffice it to say, that at the conclusion of the argument, we were satisfied that the learned trial Judge's approach to the assessment of damages as regards this part of the case was, with respect, unduly rigid and that in the exceptional circumstances of the present case – to which we shall refer in a moment – a claim for diminution in value of the appellant's home did lie. In consequence, he had failed to take into the consideration the fact that land has a reputation, so that when, as here, a stigma attaches to the dwelling house, because it is prone to flooding, it does not matter whether the appellant is in occupation of it, because the appellant will eventually sell. We are supported in this by the following passage in the judgment of Judge Brian Gibbens QC sitting as a deputy Judge in the Queen's Bench Division in *Bunclark & Others v. Hertfordshire County Council & Anor.* [1977] CLY para. 2148:

> ... but the plaintiffs are each also entitled to general damages reflecting the diminution in value of their flats which must include the factor that Rosary Court block C has now such a bad reputation as a jerry-built structure that it may take a long time to find anyone bold enough to buy any flat there.

We do not consider that the sum of RM90,000 estimated by the appellant's expert to cover this particular head of the claim for general damages to be in any way excessive or wrong in principle.

In the result, the appeal was allowed but only to extent that the quantum of damages awarded by the learned trial Judge was increased by the addition of an award of RM90,000 by way of general damages for diminution in value of the appellant's home by reason of the stigma aforesaid attaching to it. In all other respects, the judgment of the learned trial Judge was upheld. The respondent was ordered to pay the costs of the appeal and there was the usual order for refund of deposit.

Reported by Gan Peng Chiang

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